

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	Case No. 4:11CR3081
Plaintiff,	)	
	)	
vs.	)	<b>TENTATIVE</b>
	)	<b>FINDINGS</b>
ROBERT M. KILTS,	)	
	)	
Defendant.	)	

I am in receipt of the revised presentence investigation report and addendum in this case.

IT IS ORDERED that:

(1) The undersigned will consult and follow the Guidelines to the extent permitted and required by *United States v. Booker*, 543 U.S. 220(2005) and subsequent cases. See, e.g., *Gall v. U.S.*, --- S.Ct. ----, 2007 WL 4292116 (2007). In this regard, the undersigned gives notice that, unless otherwise ordered, he will (a) give the advisory Guidelines such weight as they deserve within the context of each individual case and will filter the Guidelines' general advice through §3553(a)'s list of factors<sup>1</sup>; (b) resolve all factual disputes relevant to sentencing by the greater weight of the evidence and without the aid of a jury; (c) impose upon the government the burden of proof on all Guideline-enhancements; (d) impose upon the defendant the burden of proof on all Guideline-mitigators; (e) depart from the advisory Guidelines, if appropriate, using pre-Booker departure theory; and (f) in cases where a departure using pre-Booker departure theory is not warranted, deviate or vary from the Guidelines when there is a principled reason which justifies a sentence different than that called for by application of the advisory Guidelines.<sup>2</sup>

(2) The defendant's objections to various child pornography enhancements (filing no. 29) and the defendant's motion for variance (filing no.30) will be resolved at sentencing.

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<sup>1</sup>However, I will no longer give the Guidelines "substantial weight."

<sup>2</sup>See note 1.

Two observations are in order. First, a Guidelines' range of 151 to 188 months as stipulated by the parties or a Guidelines' range of 210 to 262 months as found by the probation officer, while undoubtedly flowing from good faith applications of the sentencing manual, would result in a prison sentence that is likely far too high. Second, the median sentence in this district for all child pornography crimes from 2007 through 2011 was 72 months.<sup>3</sup> That seems about right for a person like the defendant who has no criminal history and who poses no threat to children who are around him but who left his file sharing program active such that these images could be accessed by other people.<sup>4</sup>

(3) Except to the extent (if at all) that I have sustained an objection or granted a motion or reserved an issue for later resolution in the preceding paragraph, the parties are herewith notified that my tentative findings are that the presentence report is correct in all respects.

(4) If **any** party wishes to challenge these tentative findings, said party shall, as soon as possible, but in any event at least five (5) business days before sentencing, file in the court file and serve upon opposing counsel and the court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and how long such a hearing would take.

(5) Absent submission of the information required by the preceding paragraph of this order, my tentative findings may become final and the presentence report may be adopted and relied upon by me without more.

(6) Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

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<sup>3</sup>Note that judge-specific sentencing data for this time period has now been made available on the Court's external web site.

<sup>4</sup>I assume without deciding that the defendant tried to turn the program off but it remained on inadvertently.

May 15, 2012.

BY THE COURT:

*Richard G. Kopf*

Senior United States District Judge